



July 12, 2001

Mr. Michael Greenberg
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2001-3016

Dear Mr. Greenberg:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149361.

The Texas Department of Health (the “department”) received a request for copies of documents that pertained to the requestor, another specified person, and a company called Aesthetics Clinics, Inc. You state that you have or will release most of the responsive information to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We note at the outset that the department failed to comply with the procedural requirements of section 552.301 of the Government Code. Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. The department received the requestor’s written request for information on April 18, 2001. As you acknowledge, you did not request a decision from this office until May 8, 2001, more than ten business days after the requestor’s written request. Therefore, we conclude that the department failed to meet its ten-day deadline for requesting a decision from this office. When a governmental body fails to request a decision within ten business days of receiving a request for information, the information at issue is presumed public. *See* Gov’t Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ’g*

Co., 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is some other source of law that makes the information confidential or a demonstration that third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Since you claim that the submitted information is excepted from disclosure pursuant to sections 552.101 and 552.110 of the Government Code, we will address your claims.

Pursuant to section 552.305 of the Government Code, you notified two companies who may have a proprietary interest in some of the requested information, Continuum Biomedical and Texas Medical Clinics, Inc. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). As of the date of this letter, neither Continuum Biomedical nor Texas Medical Clinics, Inc. has submitted any comments to this office explaining why portions of the submitted information should not be released. Therefore, we have no basis to conclude that any of the submitted information is excepted from disclosure under section 552.110 of the Government Code. *See* Open Records Decision Nos. 552 at 5 (1990) (stating that if governmental body takes no position, attorney general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, you may not withhold any of the submitted information from the requestor pursuant to section 552.110 of the Government Code.

You claim that one of the submitted documents is a medical record that is protected from disclosure under section 552.101 of the Government Code in conjunction with the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code.¹ The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). We agree that the document you refer to is a medical record that may only be disclosed in accordance with the access provisions of the MPA. Therefore, you must withhold this document from disclosure pursuant to section 552.101 of the Government Code in conjunction with the

¹ Section 552.101 of the Government Code excepts information from disclosure "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes.

MPA. Since you make no other arguments against disclosure of the submitted information, we conclude that you must release all other documents to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).


If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald J. Bounds". The signature is fluid and cursive, with the first name "Ronald" being the most prominent.

Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 149361

Enc. Marked documents

c: Ms. Whitney Broach
P.O. Box 56143
Houston, Texas 77256
(w/o enclosures)